

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X	Civil Docket#
SCHWAB, et al.,	: 04-cv-1945
Plaintiff	:
- versus -	: U.S. Courthouse
	: Brooklyn, New York
PHILIP MORRIS, USA INC.,	:
et al.,	:
Defendant	: April 19, 2005
-----X	

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT  
BEFORE THE HONORABLE STEVEN M. GOLD  
UNITED STATES MAGISTRATE JUDGE

**A P P E A R A N C E S:**

For the Plaintiff: **Douglas McNamara, Esq.**  
**Paul Gallagher, Esq.**

For the Defendant: **Murray Garnick, Esq.**

Official Transcriber: **Rosalie Lombardi**  
**L.F.**

Transcription Service: **Transcription Plus II**  
  
823 Whittier Avenue  
New Hyde Park, N.Y. 11040  
(516) 358-7352

Proceedings recorded by electronic sound-recording,  
transcript produced by transcription service

**Proceedings**

3

1 there is a couple of things that I think are  
2 undisputed.

3           The first point is that Philip Morris  
4 not relying on the study and no defense expert  
5 is relying on the study.

6           THE COURT: That goes to my question  
7 number one. You say that no defense expert is  
8 relying on the study. I was interested to read  
9 in one of the decisions that one of the parties  
10 cite, I wish I could tell you I remembered which  
11 one it was but I can't, the Court notes that the  
12 expert having recently participated in this  
13 study which is so germane to the facts in  
14 dispute in the case, will necessarily have his  
15 or her opinions influenced and affected by his  
16 immersion in the details of the study, even if  
17 he does not explicitly rely upon it.

18           One of the things that I haven't heard  
19 you say and I don't know if it's because it's  
20 not true or because you just haven't thought to  
21 say it is whether the experts you will be  
22 calling at trial have had access to and  
23 participated in the use of the data that you're  
24 seeking to protect from disclosure.

25           MR. GARNICK: Well --

**Proceedings**

4

1           THE COURT: In other words, are the  
2 experts who are working on the study, do they  
3 overlap with the experts you intend to call at  
4 trial?

5           MR. GARNICK: For the outside experts,  
6 the answer is clear. None of the outside  
7 experts had any involvement in the study. They  
8 don't have access to the data and they have just  
9 no knowledge of the study other than what -- to  
10 the extent we give them the papers that were  
11 filed before this court.

12           Obviously, to the extent that Philip  
13 Morris' internal scientists are called to  
14 testify, some of them have been involved in the  
15 study. However, they're not going to be relying  
16 on the study. And the reason they're not going  
17 to be relying on the study goes to my second  
18 point and that is it is an ongoing study and the  
19 statistical analysis of the study has barely  
20 begun. There is nothing to rely on. They're  
21 not going to rely on the results. They don't  
22 have results. They don't have statistical  
23 analysis.

24           What the issue here, after all, is not  
25 trying to get Philip Morris' statistical

Proceedings

6

1           There is little utility in the study  
2 for a number of reasons. First, as I say, we're  
3 not relying on the study. No one will be  
4 relying on the study. Plaintiffs have not cited  
5 a single case like this where no one is relying  
6 on the study that's not incorporated in anyone's  
7 analysis.

8           Second, this is a fraud case. And  
9 ongoing study whose statistical analysis has not  
10 been completed is not going to be relevant to  
11 any so-called secret information that Philip  
12 Morris might have had or any fraudulent intent.  
13 It's not relevant to fraud.

14           Next, Philip Morris is not trying to be  
15 over inclusive in its objections. It's turning  
16 over all the documents. It's already turned  
17 over over 20,000 pages of documents. It's  
18 continuing to turn over documents. It's going  
19 to turn over the pilot study. It's going to  
20 turn over the data for the pilot study.

21           It is rifle-shotting (sic) the database  
22 because it's an ongoing process --

23           THE COURT: I don't understand the use  
24 of the phrase rifle-shotting. I'm sorry. What  
25 do you mean by rifle-shotting?